UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

JORDAN'S MEATS,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	
	)	
DUTCH GOLD HONEY, INC.,	***)***	
	)	
Defendant/	***)***	***Docket No. 98-197-P-H***
Third-Party	***)***	
Plaintiff	***)***	
	)	
v.	***)***	
	)	
SUNLAND INTERNATIONAL,	***)***	
INC., et al.,	***)***	
	)	
Third-Party	***)***	
Defendants	***)***	

RECOMMENDED DECISION ON THIRD-PARTY DEFENDANTS' MOTIONS TO SET ASIDE DEFAULT AND TO DISMISS FOR LACK OF PERSONAL JURISDICTION

Jordan's Meats ("Jordan's") filed the instant diversity suit against Dutch Gold Honey, Inc. ("Dutch Gold") in May 1998, seeking damages of at least $400,000 for Dutch Gold's alleged negligence and breach of contract in supplying Jordan's with blended honey that Jordan's claims caused its honey-flavored hams to emit a foul odor, rendering them unmarketable. Complaint (Docket No. 1). Dutch Gold in turn sued three honey suppliers, Sunland International, Inc.

("Sunland"), C.M. Goettsche & Co. ("CMG") and Vincent Coppola d/b/a Coppola Apiaries ("Coppola"), for contribution and/or indemnification. Third-Party Complaints (Docket Nos. 5a-c).

CMG now seeks the set-aside of a default entered against it, and all three third-party defendants move to dismiss pursuant to Fed. R. Civ. P. 12(b)(2) for lack of personal jurisdiction. Motion to Set Aside Default of Third Party Defendant C.M. Goettsche & Co., Inc. ("CMG Default Motion") (Docket No. 19); Third Party Defendant Sunland International, Inc.'s Motion to Dismiss for Lack of Personal Jurisdiction, etc. ("Sunland Motion") (Docket No. 7); Motion of Defendant Vincent Coppola d/b/a Coppola Apiaries for Dismissal Under Fed.Civ.P. 12(b)(2) ("Coppola Motion") (Docket No. 10); Third-Party Defendant C.M. Goettsche & Co., Inc's Motion to Dismiss ("CMG Motion") (Docket No. 27). For the reasons that follow, I recommend that all four motions be granted.[1]

I. Factual Background

Dutch Gold complains as an initial matter that its efforts to respond to the pending motions to dismiss have been frustrated both by the limited nature of the discovery allowed on the jurisdictional issue and by the incompleteness of the third-party defendants' answers to its interrogatories. Dutch Gold Honey, Inc.'s Opposition to Third Party Defendants' Motions to Dismiss for Lack of Personal Jurisdiction ("Dutch Gold Opposition") (Docket No. 32) at 2. It urges the court either to deny the motions or to permit additional discovery. *Id*. at 5.

Following a telephone conference with counsel for the parties on October 6, 1998, I ordered

[1]I also grant, without objection, Dutch Gold's motion for an extension of time within which to file a response to the third-party defendants' motion to dismiss. Defendant's Motion for Enlargement of Time to File Response to Motions to Dismiss for Lack of Personal Jurisdiction (Docket No. 31).

that all discovery as to the third-party defendants be stayed except for that concerning personal jurisdiction, which was to be limited to the contacts of the third-party defendants with the state of Maine. Endorsement to Third Party Defendant Sunland International, Inc.'s Motion to Stay (Docket No. 11). Upon carefully reviewing the discovery appended to the Dutch Gold Opposition, I am satisfied that all third-party defendants have responded completely to questions insofar as they pertain to their contacts with the state of Maine. The record thus is fully developed for purposes of ruling on the motions to dismiss. To the extent that the third-party defendants objected to answering questions concerning the scope of their contacts outside the state of Maine, they did so properly. The scale upon which they conduct their businesses nationwide or worldwide is irrelevant to the question whether each has sufficient contacts with the state of Maine to justify this court's exercise of personal jurisdiction.

In view of the foregoing, the record reveals the following undisputed facts.

Dutch Gold does not produce its own honey; rather, it buys honey in bulk for use in the blending process it employs. Affidavit [of William R. Gamber, II] in Opposition to Defendant's Motion to Dismiss for Lack of Personal Jurisdiction ("Gamber Aff."), attached to Defendant Dutch Gold Honey's Supplemental Memorandum of Law, etc. (Docket No. 25) ¶ 1. The honey that is the subject of the instant suit came from three of Dutch Gold's regular suppliers — Sunland, Coppola and CMG. *Id.* ¶ 2. Dutch Gold has done business with Sunland and CMG for more than ten years and with Coppola since Dutch Gold purchased McLure's Honey ("McLure's") in February 1997. *Id.* ¶¶ 3-4. Prior to Dutch Gold's purchase of McLure's, Coppola did business with McLure's for approximately ten years. *Id.* ¶ 4.

Sunland is a Connecticut corporation that imports and sells the raw material that is used to

process honey. Affidavit of John S. Villanova, CPA ("Villanova Aff.") (Docket No. 8) ¶ 1. Its principal and only place of business is in New Canaan, Connecticut. *Id*. Sunland supplies raw, unprocessed honey to processors located in Pennsylvania and New Hampshire, including Dutch Gold/McLure's. *Id*. Its customers blend the honey according to their trade recipes and then sell it as their own under their own label. Third-Party Defendant Sunland Corporation's Answers to Defendant Dutch Gold Honey, Inc.'s Jurisdictional Interrogatories, etc. ("Sunland Interrog."), attached as Exh. C to Dutch Gold Opposition, No. 5. Sunland has no plant or factory. *Id*. It does not market, label or sell any final product; nor are any of its customers end users. *Id*. No. 10. It uses no distributors to sell its product, which is sold by the shipping container load, with each container housing approximately fifty-five to sixty-five drums. *Id*. Nos. 10, 12. Generally, there are no markings other than the container number on the container. *Id*. No. 10. Sunland's name appears only on the bills of lading or other accompanying shipping documents. *Id*.

Sunland never has had any Maine customers, nor has it ever purchased honey in Maine. *Id*. Nos. 11, 13. It has no offices, employees, sales representatives, retail or wholesale outlets or real estate holdings in Maine, is not registered to do business here and has never conducted business or advertised here. Villanova Aff. ¶ 2; Sunland Interrog. No. 3. Sunland never has undertaken any advertising or marketing campaign, although it has on occasion placed "tombstone" style announcements or advertisements in trade journals. Sunland Interrog. Nos. 5, 10. For example, in 1994 it placed a tombstone in the 1994 Annual Report of the Association of Food Industries. *Id.* No. 5.

Vincent Coppola, Jr., is the owner and principal operator of Coppola Apiaries. Affidavit of Vincent Coppola Jr. d/b/a Coppola Apiaries ("Coppola Aff."), attached as Exh. A to Coppola

Motion, ¶ 1. His business, a sole proprietorship, is located in Forestville, New York. *Id.* ¶ 2. He has only one office. *Id.* He never has had an office or employees in Maine, nor has his business ever owned property or been registered to do business here. *Id.* Coppola Apiaries never has directed advertisements or promotional materials to the state of Maine or any companies or individuals located here. *Id.* ¶ 3.

Coppola sells raw honey under a "Coppola Apiaries" label to food processors, bakeries, honey packers and direct purchasers of honey, including McLure's, which is located in Littleton, New Hampshire. *Id.* ¶ 4; Third-Party Defendant Vincent Coppola d/b/a Coppola Apiaries's Answers to Defendant Dutch Gold Honey, Inc.'s Jurisdictional Interrogatories, etc. ("Coppola Interrog."), attached as Exh. E to Dutch Gold Opposition, Nos. 9-10. Coppola Apiaries does not process honey. Coppola Aff. ¶ 4. Coppola does not use distributors; parties who sell the honey again do so under their own label. Coppola Interrog. No. 12. Coppola's records reveal one sale of sixty barrels of honey to a Maine company, Nomad Apiaries of Brewer, Maine, in 1991-92, for $20,600. Coppola Aff. ¶ 6. Neither before nor since has Coppola Apiaries conducted business in the state of Maine or with Maine companies or individuals. *Id.* ¶ 7. Coppola Apiaries has purchased no honey from the state of Maine. Coppola Interrog. No. 13.

CMG was served with process in this case on August 26, 1998. Inasmuch as CMG had twenty days in which to respond, *see* Fed. R. Civ. P. 12(a), its response was due on September 15, 1998. Through its insurance agent, CMG reported the claim to its insurer, CGU/New Jersey, and the matter was referred on September 3, 1998 to Matthew Menkowski, a senior claim representative, for handling. Affidavit [of Matthew Menkowski] ("Menkowski Aff.") (Docket No. 24) ¶¶ 1-2, 4. Because of the nature of the allegations against CMG, Menkowski felt it necessary to obtain an

insurance coverage opinion from CGU's coverage unit, which is located in a different state. *Id*. ¶ 5. Menkowski spoke to coverage counsel by telephone on September 17, 1998 to expedite receipt of the coverage opinion. *Id.* ¶ 8. After obtaining the opinion, he placed a call on September 21, 1998 to Glenn Robinson, counsel for Dutch Gold. *Id*. He was astonished to learn that Robinson already had filed a motion for default. *Id.* The clerk's office entered a default against CMG on September 21, 1998 for failure to respond or otherwise plead. Endorsement to Defendant Dutch Gold Honey's Motion for Default Against Third-Party Defendant C.M. Goettsche & Co., Inc. (Docket No. 14). CGU/New Jersey retained the Maine firm of Richardson, Whitman, Large & Badger to defend CMG. Menkowski Aff. ¶ 9. On September 24, 1998 CMG filed motions for leave to file a late answer and to set aside its default. Motion of Third-Party Defendant, C.M. Goettsche & Co., Inc. for Leave to File Late Answer (Docket No. 18); CMG Default Motion. Menkowski explains that, in New Jersey, deadlines for responding to a complaint in either state or federal court are not routinely enforced. Menkowski Aff. ¶ 7. He was not previously familiar with default practice in the state of Maine, and was advised by attorney John Whitman that the twenty-day deadline for responding to a complaint is taken very seriously in Maine. *Id*. ¶ 9. Had he known that, he would have contacted Robinson before September 15 to request additional time within which to respond to the third-party complaint. *Id.*

CMG is located and does business in Short Hills, New Jersey. Affidavit [of Charles V. Kocot] ("First Kocot Aff.") (Docket No. 23) ¶ 2. This is the company's only business location; all of its employees are located there. Answers of Third-Party Defendant C.M. Goettsche & Co., Inc. to Defendant's Jurisdictional Interrogatories ("CMG Interrog."), attached as Exh. D to Dutch Gold Opposition, No. 3. CMG is in the business of importing crude honey, which then is sold to other

companies. First Kocot Aff. ¶ 3. It sells only drums of crude honey for further processing and is never sure exactly where its customers sell their honey. CMG Interrog. No. 8. The honey is sold in metal drums with CMG's name on them. *Id*. No. 10. CMG uses no distributors to sell its honey; instead, all sales are direct. *Id.* No. 12. Crude honey contains dead bees, sticks and other impurities; hence, all of CMG's customers must process the honey before it is used in the marketplace. Affidavit of Charles Kocot ("Second Kocot Aff."), attached to Reply Memorandum of Law in Support of C.M. Goettsche & Co., Inc.'s Motion to Dismiss (Docket No. 34), ¶¶ 3-4. CMG has reason to believe that its honey ultimately is incorporated in cereals, barbecue sauce, salad dressing, beer, candy, meats, mustard and other food products. CMG Interrog. No. 9.

During the past five years CMG has purchased honey from suppliers in China, Argentina, Mexico, Uruguay and Chile, and has sold honey to approximately twenty-five customers located in New York, Pennsylvania, Oregon, California, Virginia, Louisiana, Ohio, Texas, Michigan and Illinois. CMG Interrog. No. 2. These customers have included Dutch Gold and McLure's. First Kocot Aff. ¶ 4. CMG has neither had Maine customers nor purchased any honey from Maine in the past five years. CMG Interrog. Nos. 11, 13. CMG has in the past placed some small advertisements in an industry trade paper, but it has not done so for several years. *Id*. No. 5.

While the foregoing is undisputed, the parties do dispute whether, and to what extent, Sunland, Coppola and CMG are aware of the destination of the Dutch Gold and McLure's products.

Dutch Gold contends that all three suppliers have been advised, and are well aware, that Dutch Gold and its subsidiary, McLure's, sell honey commercially throughout the United States. Gamber Aff. ¶ 3. They have been advised that customers of Dutch Gold include large conglomerates such as General Mills, Kraft Foods and Jordan's. *Id*.

Sunland avers that, when it supplies raw material to a processor such as Dutch Gold, it does not know where the finished product will be sold. Villanova Aff. ¶ 3. Specifically, at the time it sold raw material to Dutch Gold, it had no way of knowing the product would be sold to Jordan's or end up in Maine. *Id.* It does not know who Dutch Gold's customers are, where Dutch Gold ships its final product or what amount of the raw material it supplies is used in any of Dutch Gold's particular blends. *Id.*

Coppola states that the companies to which he sells honey do not tell him where the honey will end up because they like to protect their line of distribution. Coppola Aff. ¶ 5. He avers that he is not informed of the identities or locations of McLure's customers, for example. *Id.* Consequently, he had no way of knowing to whom his honey would be sold by McLure's, where it would go or for what purpose. *Id*. He has no way of confirming that his honey did indeed go to Jordan's, nor did he have any reason to anticipate that the honey he sold to McLure's would come to a Maine company. *Id.*

In like vein, CMG notes that it cannot identify the processors or manufacturers of the final products in which its honey is used because it does not sell to them directly. CMG Interrog. No. 9. It states, specifically, that it is unaware of the identity of Dutch Gold's customers or that Dutch Gold sold honey to any user in Maine, including Jordan's. *Id*. No. 14; Second Kocot Aff. ¶ 5.

II. Discussion

A. Set-Aside of CMG's Default

Under Fed. R. Civ. P. 12(a), a defendant must file an answer within twenty days after service of a summons and complaint. If it fails to do so, Rule 55(a) provides that the clerk of the court "shall enter the party's default." Under Fed. R. Civ. P. 55(c), the court may set aside an entry of default

"[f]or good cause shown."[2] The decision whether to set aside an entry of default is left to the court's discretion in light of the circumstances in each case. *Phillips*, 103 F.R.D. at 179. Courts, however, are to be mindful that the set-aside of default comports "with the philosophy that actions should ordinarily be resolved on their merits." *Coon v. Grenier*, 867 F.2d 73, 76 (1st Cir. 1989).

This court has "identified six factors to be considered in the exercise of its discretion: (1) the excuse for the delay; (2) the existence of a meritorious defense; (3) prejudice to the other party; (4) the amount of money involved; (5) the good faith of the parties; and (6) the timing of the motion to set aside the default." *Grover v. Commercial Ins. Co.*, 108 F.R.D. 366, 368 (D. Me. 1985) (citation omitted).

Turning to the first of these factors, CMG offers evidence that it promptly forwarded the complaint to its insurer and that a delay ensued while the insurer sought a coverage opinion. The New Jersey-based insurer was surprised to learn that a motion for default had been filed inasmuch as defaults are not so readily sought or entered in New Jersey. CMG's explanation evidences not justifiable excuse, but rather unjustifiable sloppiness. Nonetheless, as weak as is CMG's showing as to the first factor, the balance tips in its favor in view of the strength of its showing as to the remaining five.

CMG does indeed (for the reasons discussed below) have a meritorious defense — that the court lacks personal jurisdiction over it. Dutch Gold identifies no prejudice that it has suffered, nor can I perceive any other than the additional effort it has expended in dealing with CMG's default.

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[2]Entry of default is to be distinguished from judgment by default. Entry of default is merely "an interlocutory step that is taken under Rule 55(a) in anticipation of a final judgment by default under Rule 55(b)." *Phillips v. Weiner*, 103 F.R.D. 177, 179 (D. Me. 1984) (citation and internal quotation marks omitted). The "good cause" standard for relief for set-aside of a default entry hence is more liberal than the standard for set-aside of a default judgment. *Id.*

A substantial sum of money — approximately $400,000 — is involved. There is no showing whatsoever of any bad faith on the part of either party.[3] Finally, CMG filed its motion to set aside default on September 24, 1998, only nine days after its answer was due and three days after default was entered by the clerk's office. Thus, despite CMG's failure to show excusable neglect, set-aside of the default is warranted. *See, e.g., Phillips*, 103 F.R.D. at 181 (relief justified despite "less than compelling" excuse inasmuch as all other criteria militated in favor of set-aside of default).

B. Exercise of Personal Jurisdiction

When a defendant seeks dismissal under Rule 12(b)(2), the plaintiff (in this case, the third-party plaintiff) bears the burden of demonstrating the existence of personal jurisdiction. *Boit v. Gar-Tec Prods., Inc.*, 967 F.2d 671, 674-75 (1st Cir. 1992) (citations omitted). The "baseline" framework for analysis of such a motion to dismiss is the *prima facie* standard, in which the court, rather than acting as a fact-finder, "ascertains only whether the facts duly proferred, fully credited, support the exercise of personal jurisdiction." *Rodriguez v. Fullerton Tires Corp.*, 115 F.3d 81, 84 (1st Cir. 1997). As it would in the context of a summary-judgment proceeding, the court views disputed facts in the light most favorable to the non-movant (here, the third-party plaintiff) for purposes of determining whether the case should proceed to trial. *Sawtelle v. Farrell*, 70 F.3d 1381, 1385 (1st Cir. 1995).

Dutch Gold asserts that in this case material factual disputes preclude application of the

[3]Dutch Gold suggests that CGU/New Jersey's hesitation to defend would, under Maine law, have raised a question of bad faith. Defendant Dutch Gold Honey, Inc.'s Memorandum in Opposition to Third-Party Defendant C.M. Goettsche's Motion to Strike Default (Docket No. 29) at 2. Dutch Gold does not explain how or why Maine law would apply to a dispute between a New Jersey-based company and its New Jersey-based insurer. In any event, as CMG points out, its insurer never refused to defend. Reply Memorandum of Law in Support of Third-Party Defendants [sic] C.M. Goettsche & Co., Inc.'s Motions, etc. (Docket No. 30) at 2.

prima facie standard, warranting the scheduling of an evidentiary hearing (or, alternatively, denial of the motions). Dutch Gold Opposition at 3-4. The third-party defendants, Dutch Gold asserts, knew who Dutch Gold's customers were. *Id.* The affidavit upon which Dutch Gold relies for this proposition states that the third-party defendants were advised that Dutch Gold's customers included "large conglomerates such as General Mills, Kraft Foods and Jordan's." Gamber Aff.¶ 3. It is thus unclear, as an initial matter, that Dutch Gold alleges — in direct contradiction to the affidavits and interrogatories submitted by the the third-party defendants — that they specifically knew their product would end up at Jordan's (as opposed to companies "such as" Jordan's). Even assuming *arguendo*, however, that Dutch Gold does so allege, its assertion is (for reasons discussed below) immaterial. Resort to an evidentiary hearing accordingly is unnecessary.

A court's personal jurisdiction over a defendant must be premised on one of two theories: specific or general jurisdiction. *Foster-Miller, Inc. v. Babcock & Wilcox Canada*, 46 F.3d 138, 144 (1st Cir. 1995). "General jurisdiction exists when the litigation is not directly founded on the defendant's forum-based contacts, but the defendant has nevertheless engaged in continuous and systematic activity, unrelated to the suit, in the forum state." *Id.* (citation and internal quotation marks omitted). Dutch Gold does not contend that principles of general jurisdiction are applicable. Therefore, "the lens of judicial inquiry narrows to focus on specific jurisdiction," which "requires weighing the legal sufficiency of a specific set of interactions as a basis for personal jurisdiction." *Id.* (citations omitted). In so doing, the court applies the long-arm statute of the forum state. *Nowak v. Tak How Invs., Ltd.*, 94 F.3d 708, 712 (1st Cir. 1996) (citation omitted). Maine's long-arm statute, 14 M.R.S.A. § 704-A, expressly directs courts to construe it in a manner that creates personal jurisdiction to the fullest extent permitted by the due process clause of the federal Constitution.

"[W]hen a state's long-arm statute is coextensive with the outer limits of due process, the court's attention properly turns to the issue of whether the exercise of personal jurisdiction comports with federal constitutional standards." *Sawtelle*, 70 F.3d at 1388 (citation omitted). The requisite inquiry proceeds in three stages:

> First, the claim underlying the litigation must directly arise out of, or relate to, the defendant's forum-state activities. Second, the defendant's forum-state contacts must represent a purposeful availment of the privilege of conducting activities in the forum state, thereby invoking the benefits and protections of that state's laws and making the defendant's involuntary presence before the state's court foreseeable. Third, the exercise of jurisdiction must, in light of the Gestalt factors, be reasonable.

Nowak, 94 F.3d at 712-13 (citation and internal quotation marks omitted).

Sunland, Coppola and CMG argue, in essence, that Dutch Gold fails these tests inasmuch as none of the three third-party defendants has anything to do with the state of Maine. Sunland Motion at 5-11; Coppola Motion at 2-5; Memorandum of Law in Support of C.M. Goettsche & Co., Inc.'s Motion to Dismiss (Docket No. 27) at 3-6. The record indeed demonstrates that neither Sunland, Coppola nor CMG purposefully availed itself of the privilege of doing business in Maine. Such a lack of purposeful availment forecloses the exercise of specific personal jurisdiction, obviating the need to consider the remaining factors listed in *Nowak*.

In *Asahi Metal Indus. Co. v. Superior Court of California*, 480 U.S. 102 (1987), a plurality of the Supreme Court expressed the view that a defendant does not purposefully avail itself of the privilege of conducting activities in the forum state simply by placing a product into the stream of commerce, even when that stream ultimately leads to the forum state. *Id*. at 112. The First Circuit embraced this view in *Boit*, reaffirming an earlier holding that the "stream of commerce" theory will not support a finding of purposeful availment even if the defendant knew that the item or items at

issue ultimately would end up in the forum state. *Boit*, 967 F.2d at 682-83. "The test is not knowledge of the ultimate destination of the product, but whether the manufacturer has purposefully engaged in forum activities so it can reasonably expect to be haled into court there." *Id.* at 682 (citation and internal quotation marks omitted).

On this record, I am hard-pressed to find any conduct whatsoever on the part of any of the three third-party defendants indicating purposeful availment of the privilege of doing business in Maine. None of the third-party defendants is registered to do business in Maine, has any offices, real estate or personnel here, has transacted any business here within the past five years or has directed any advertising at businesses or individuals within the state. The only connection to which Dutch Gold can point is its assertion that the third-party defendants were aware that their product would end up at Jordan's in Maine. Even assuming *arguendo* that this were so, however, it would not salvage Dutch Gold's case for personal jurisdiction. Controlling law makes crystal-clear that mere awareness that a product will end up at a certain destination does not translate to "purposeful availment." *Asahi*, 480 U.S. at 112; *Rodriguez*, 115 F.3d at 85.

Faced with this paucity of evidence of Maine contacts, Dutch Gold struggles to fit the square peg of the instant facts into the round hole of this court's findings in *Unicomp, Inc. v. Harcros Pigments, Inc.*, 994 F. Supp. 24 (D. Me. 1998), in which the court discerned a distributorship relationship between Harcros, a pigment manufacturer, and Walsh & Associates, Inc., a Harcros distributor that filled Unicomp's orders for Harcros pigments. Dutch Gold Opposition at 4-5. In the instant case, however, all evidence of record cuts against any finding of a distributorship relationship. Dutch Gold does not market honey on behalf of any of the three third-party defendants. To the contrary, it simply buys raw honey in bulk from the third-party defendants, which it then processes

for resale. At that point the transaction concludes. There is no evidence that any of the honey, once processed by Dutch Gold, is resold under the label of or on behalf of any of the third-party defendants, or that the third-party defendants receive any further monetary or other consideration upon its resale. Indeed, all three third-party defendants flatly state that they do not use distributors. Dutch Gold adduces no evidence to the contrary.[4]

At bottom, the record discloses that neither Sunland, Coppola nor CMG made any conscious choice or undertook any act to direct its product to Jordan's or to Maine. Instead, Dutch Gold took the helm, navigating its product through the stream of commerce to its ultimate destination. Inasmuch as none of the third-party defendants purposefully availed itself of the privilege of doing business in Maine, the court cannot, consistent with the constraints of due process, exercise personal jurisdiction over any of them.

III. Conclusion

For the foregoing reasons, I recommend that CMG's motion to set aside default be **GRANTED**, and that the motions of Sunland, Coppola and CMG to dismiss pursuant to Rule 12(b)(2) for lack of personal jurisdiction be **GRANTED**. If my recommended decision regarding the CMG motion to set aside default is adopted, then its motion to file a late answer (Docket No. 18) is granted; otherwise, it is denied.

[4]Further facts of record — that raw honey is unsuitable for "end use" in that it contains impurities such as sticks and dead bees, and that Dutch Gold blends and processes raw honey — militate against a finding that Dutch Gold is reselling the third-party defendants' product on their behalf.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 24th day of November, 1998.

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David M. Cohen
United States Magistrate Judge